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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 DELAYNE M. T.,

12 Plaintiff,

13 v.

14 COMMISSIONER OF SOCIAL
15 SECURITY,

16 Defendant.

17 CASE NO. 2:21-CV-611-DWC

18 ORDER

19 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of
20 Defendant's denial of Plaintiff's applications for supplemental security income ("SSI") and
21 disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil
22 Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by
23 the undersigned Magistrate Judge. *See* Dkt. 3.

24 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
25 did not err in evaluating the medical opinion evidence or Plaintiff's subjective testimony. Thus,
26 the Court affirms the ALJ's decision.

FACTUAL AND PROCEDURAL HISTORY

2 On January 5, 2018, Plaintiff filed an application for DIB, followed by an application for
3 SSI on January 17, 2018; Plaintiff alleged in both applications a disability onset date of January
4 1, 2016, later amending this date to January 1, 2017. *See* Dkt. 6; Administrative Record (“AR”)
5 246–47, 248–55. The applications were denied upon initial administrative review and on
6 reconsideration. *See* AR 83–84, 119–20. A hearing was held before ALJ M.J. Adams on May 26,
7 2020. *See* AR 45–82. In a decision dated June 30, 2020, the ALJ determined Plaintiff to be not
8 disabled. *See* AR 20–42. Plaintiff’s request for review of the ALJ’s decision was denied by the
9 Appeals Council, making the ALJ’s decision the final decision of the Commissioner. *See* AR 1;
10 20 C.F.R. § 404.981, § 416.1481.

11 In Plaintiff's Opening Brief, Plaintiff maintains the ALJ erred by improperly: (1)
12 evaluating Plaintiff's subjective testimony; and (2) evaluating the medical opinion evidence. Dkt.
13 9, p. 1.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

I. Whether the ALJ Properly Considered Plaintiff's Subjective Symptom Testimony.

22 Plaintiff asserts that the ALJ failed to give a clear and convincing reason for rejecting
23 Plaintiff's subjective symptom testimony. Dkt. 9, pp. 9–13. To reject a claimant's subjective

1 complaints, the ALJ's decision must provide "specific, cogent reasons for the disbelief." *Lester*
 2 *v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (citation omitted). The ALJ "must identify what
 3 testimony is not credible and what evidence undermines the claimant's complaints." *Id.*; *Dodrill*
 4 *v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is
 5 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and
 6 convincing." *Lester*, 81 F.2d at 834. "[B]ecause subjective descriptions may indicate more severe
 7 limitations or restrictions than can be shown by medical evidence alone," the ALJ may not
 8 discredit a subjective description "solely because it is not substantiated affirmatively by objective
 9 medical evidence." *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

10 At the hearing, Plaintiff testified that she was let go from her last job due to attendance
 11 issues, which she blamed on extreme pain resulting from endometriosis and spinal issues. AR 58.
 12 She went on to state that even minimal activity could cause tachycardia and shortness of breath.
 13 AR 62. Plaintiff estimated that she could sit upright for no more than 20 minutes in an 8-hour
 14 day. AR 65–66. In addition, Plaintiff testified that she suffered from frequent panic attacks,
 15 particularly but not exclusively in social settings, and that she had exhausted all of her pain
 16 treatment options. AR 63. Finally, Plaintiff testified that she took a combination of prescription
 17 opiates and psychiatric medication daily and suffered from impaired memory and concentration.
 18 AR 61.

19 The ALJ reasoned that this testimony was inconsistent with (1) Plaintiff's employment
 20 history; (2) Plaintiff's non-compliance with treatment recommendations; and (3) objective
 21 medical evidence, including examination findings, spinal imaging, and treatment notes, since the
 22 alleged onset date. AR 29–30.

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1 With respect to the ALJ's first reason, an ALJ may discount a claimant's symptom
2 testimony on the basis that the claimant's impairments "remained constant for a number of years
3 and . . . not prevented her from working over that time." *Gregory v. Bowen*, 844 F.2d 664, 667
4 (9th Cir. 1988). Here, the ALJ found that Plaintiff worked for many years in spite of allegedly
5 disabling impairments. For example, Plaintiff underwent laparoscopic surgeries for her
6 endometriosis in February 2013 and December 2014, and muscle response testing from 2015
7 showed that scar tissue was encroaching on her spinal root nerves. AR 28 (citing AR 423, 427).
8 At that time, and the years leading up to her alleged onset of disability, Plaintiff complained of
9 pelvic pain, back pain, shortness of breath, tachycardia, depression, and anxiety, for which she
10 took pain relief and psychiatric medications. See AR 29 (citing AR 439–444, 456, 575, 592). The
11 ALJ found that, despite these issues, Plaintiff remained gainfully employed as a customer service
12 clerk through the end of 2016. AR 29 (citing AR 72, 258, 288). Based on this evidence, it was
13 not unreasonable for the ALJ to conclude that Plaintiff was able to work at a substantial gainful
14 activity level for many years with her endometriosis, spinal impairments, and psychological
15 issues. *Gregory*, 844 F.2d at 667.

16 With respect to the ALJ's second reason, a claimant's "unexplained, or inadequately
17 explained, failure to seek treatment or follow a prescribed course of treatment" can undermine
18 her allegations. *Fair v. Bowen*, 885 F.2d 597, 603-04 (9th Cir. 1989). Here, the ALJ thoroughly
19 summarized abundant evidence in the record indicating that Plaintiff did not comply with pain
20 treatment medications. The ALJ found that Plaintiff's treating doctors routinely advised her to
21 taper off her usage of narcotic pain medications, and that in spite of this, Plaintiff would take
22 more than was prescribed. See AR 30 (citing AR 490–92, 497–98, 528–31). The ALJ found that
23 this pattern continued throughout the period at issue, despite Plaintiff being advised by a
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1 gynecologist that her high dose of medication was hurting more than helping, and later being told
2 that her reported degree of pain was much greater than anything endometriosis could cause and
3 that her inactivity was exacerbating her symptoms. AR 30 (citing AR 625–26, 720, 730–32).

4 Plaintiff disputes this reasoning, but does not actually point to any evidence that the ALJ
5 did not consider. Instead, she notes a single occasion in which Plaintiff's doctor merely advised
6 her to try to taper her medication from eight doses of Percocet per day to seven. Dkt. 9, p. 11
7 (citing AR 471, 531). However, contrary to Plaintiff's claim, the ALJ considered this evidence
8 and found that Plaintiff did not actually taper the amount of doses; indeed, in a 2020 evaluation
9 cited by the ALJ, Plaintiff was prescribed a maximum of ten and one-half doses per day. AR
10 668. Plaintiff's assertion that the ALJ selectively relied on evidence to portray Plaintiff as a drug
11 addict is unsupported. Dkt. 9, p. 11. The ALJ properly considered Plaintiff's non-compliance
12 with pain treatment recommendations over time and relied on that consideration in discounting
13 Plaintiff's pain testimony. *Fair*, 885 F.2d at 603–04. Plaintiff has not shown error.

14 Plaintiff's work history and non-compliance with treatment recommendations amounted
15 to clear and convincing reasons, supported by substantial evidence, for discounting her symptom
16 testimony. While the ALJ provided additional reasons for discounting this testimony, the Court
17 need not address the ALJ's other reasons, as any error would be harmless. *See Batson v.*
18 *Commissioner of Social Security Administration*, 359 F.3d 1190, 1197 (concluding that, even if
19 the record did not support one of the ALJ's stated reasons for disbelieving claimant's testimony,
20 any error was harmless).

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1 **II. Whether the ALJ Properly Evaluated the Medical Opinion Evidence.**

2 Plaintiff assigns error to the ALJ's evaluation of a medical opinion from consultative
 3 examiner Mark Hawley, Ph.D., as well as the opinions of State agency medical consultants. Dkt.
 4 9, p. 3.

5 **A. Medical Opinion Standard of Review**

6 The regulations regarding evaluation of medical evidence have been amended for claims
 7 protectively filed on or after March 27, 2017. 20 C.F.R. §§ 404.1520c(c), 416.920c(c). As
 8 Plaintiff filed her claims for DIB and SSI on November 15, 2017, the ALJ applied the new
 9 regulations. *See* AR 21, 373.

10 In the new regulations, the Commissioner rescinded Social Security Regulation ("SSR")
 11 06-03p and broadened the definition of acceptable medical sources to include Advanced Practice
 12 Registered Nurses (such as nurse practitioners), audiologists, and physician assistants. *See* 20
 13 C.F.R. §§ 404.1502, 416.902; 82 F. Reg. 8544; 82 F. Reg. 15263. The Commissioner also
 14 clarified that all medical sources, not just acceptable medical sources, can provide evidence that
 15 will be considered medical opinions. *See* 20 C.F.R. §§ 404.1502, 416.902; 82 F. Reg. 8544; 82 F.
 16 Reg. 15263.

17 Additionally, the new regulations state the Commissioner "will no longer give any
 18 specific evidentiary weight to medical opinions; this includes giving controlling weight to any
 19 medical opinion." *Revisions to Rules Regarding the Evaluation of Medical Evidence (Revisions*
to Rules), 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68 (Jan. 18, 2017); *see also* 20 C.F.R.
 21 §§ 404.1520c (a), 416.920c(a). Instead, the Commissioner must consider all medical opinions
 22 and "evaluate their persuasiveness" based on supportability, consistency, relationship with the
 23 claimant, specialization, and other factors. 20 C.F.R. §§ 404.1520c(c), 416.920c(c). The most
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1 important factors are supportability and consistency. 20 C.F.R. §§ 404.152c(a), (b)(2),
2 416.920c(a), (b)(2).

3 Although the regulations eliminate the “physician hierarchy,” deference to specific
4 medical opinions, and assigning “weight” to a medical opinion, the ALJ must still “articulate
5 how [he] considered the medical opinions” and “how persuasive [he] find[s] all of the medical
6 opinions.” 20 C.F.R. §§ 404.1520c(a), (b)(1), 416.920c(a), (b)(1). The ALJ is specifically
7 required to “explain how [he] considered the supportability and consistency factors” for a
8 medical opinion. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2).

9 The Ninth Circuit currently requires the ALJ to provide “clear and convincing” reasons
10 for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester*, 81
11 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908
12 F.2d 502, 506 (9th Cir. 1990)). When a treating or examining physician’s opinion is
13 contradicted, the Ninth Circuit has held the medical opinion can be rejected “for specific and
14 legitimate reasons that are supported by substantial evidence in the record.” *Lester*, 81 F.3d at
15 830–31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722
16 F.2d 499, 502 (9th Cir. 1983)).

17 At this time, the Ninth Circuit has not issued a decision stating whether it will continue to
18 require an ALJ to provide “clear and convincing” or “specific and legitimate reasons,” or some
19 variation of those standards, when analyzing medical opinions. Regardless, it is not clear the
20 Court’s consideration of the adequacy of an ALJ’s reasoning under the new regulations differs
21 from the current Ninth Circuit standards in any significant respect. The new regulations require
22 the ALJ to articulate how persuasive the ALJ finds medical opinions and to explain how the ALJ
23 considered the supportability and consistency factors. 20 C.F.R. §§ 404.1520c(a), (b),
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1 416.920c(a), (b). The new regulations appear to, at the least, require an ALJ to specifically
2 account for the legitimate factors of supportability and consistency in addressing the
3 persuasiveness of a medical opinion. Furthermore, the Court must continue to consider whether
4 the ALJ's decision is supported by substantial evidence. *See* 82 Fed. Reg. at 5852 ("Courts
5 reviewing claims under our current rules have focused more on whether we sufficiently
6 articulated the weight we gave treating source opinions, rather than on whether substantial
7 evidence supports our final decision.").

8 Therefore, based on the above considerations, the Court will determine whether the
9 ALJ's decision is free of legal error and supported by substantial evidence.

10 **B. Opinion of Dr. Hawley**

11 Dr. Hawley examined Plaintiff on March 1, 2018, performing a clinical interview and
12 mental status examination, and diagnosed Plaintiff with moderate depression, marked panic
13 disorder with agoraphobia, and chronic pain syndrome. AR 612. In a functional assessment, Dr.
14 Hawley stated that Plaintiff would be moderately impaired in her remote memory and ability to
15 complete tasks in the home environment and mildly impaired in her ability to interact with
16 coworkers and the public, maintain regular attendance in the workplace, and make typical
17 workplace interpersonal demands. *Id.* In sum, Dr. Hawley opined that Plaintiff "is currently
18 presenting with symptoms of depression and anxiety" that could "moderately impact the ability
19 to be a dependable employee." *Id.*

20 The ALJ found this opinion only "somewhat persuasive," reasoning that "Dr. Hawley's
21 opinions about [Plaintiff]'s ability to maintain and/or complete tasks are notabl[y] inconsistent
22 internally, while also being without objective support." AR 33.

1 “When evaluating conflicting medical opinions, an ALJ need not accept the opinion of a
 2 doctor if that opinion is brief, conclusory, and inadequately supported by clinical findings.”
 3 *Bayliss*, 427 F.3d at 1216 (citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)). An
 4 ALJ may also reject a medical opinion “if it is based ‘to a large extent’ on a claimant’s self-
 5 reports that have been properly discounted as incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035,
 6 1041 (9th Cir. 2008) (quoting *Morgan v. Comm’r. Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir.
 7 1999)). Here, the ALJ found that Dr. Hawley’s mental status examination “found euthymic affect
 8 despite the claimant’s reports of impaired mood, along with pleasant and cooperative behavior,
 9 normal speech, logical thought process, unimpaired memory, and unimpaired concentration[,]”
 10 and thus, Dr. Hawley had “no objective support for his inconsistent opinions of limitations with
 11 dependability and consistency.” AR 33 (citing AR 609–13).

12 The ALJ relied on substantial evidence in finding the opinion on limitations to be without
 13 objective support. Dr. Hawley’s opinion was based to a large extent on Plaintiff’s self-reports.
 14 Dr. Hawley did not review any of Plaintiff’s records and, throughout much of the evaluation,
 15 wrote that “[Plaintiff] indicated” and “[Plaintiff] reported” the information contained therein. *See*
 16 AR 609–612. The ALJ correctly found that the mental status examination yielded entirely
 17 normal results. AR 611. Plaintiff argues that the ALJ “cherry-pick[ed]” Dr. Hawley’s findings,
 18 but points only to Dr. Hawley’s opinion that Plaintiff’s remote memory was “mildly impaired.”
 19 Dkt. 9, p. 6; AR 612. Yet the ALJ did not ignore this finding but, rather, accepted it, stating that
 20 Dr. Hawley found “mild or no memory impairment.” AR 33.

21 Accordingly, because Dr. Hawley’s opinion was based largely on Plaintiff’s self-reports
 22 and because the ALJ properly discounted Plaintiff’s testimony, the ALJ did not err in
 23 discounting Dr. Hawley’s opinion.

1 **C. Opinions of Non-Examining Medical Consultants**

2 On March 9, 2018, non-examining medical consultant Dan Donahue, Ph.D., opined that
 3 Plaintiff could be expected to suffer occasional lapses in attention, attendance, concentration,
 4 persistence, and pace due to her mental health symptoms, “but not at a level that precludes
 5 productive work activity.” AR 98, 115. On August 18, 2018, another non-examining medical
 6 consultant, Bruce Eather, Ph.D., opined that Plaintiff’s concentration, persistence, and pace were
 7 “diminished at times due to depression, anxiety, and pain affecting focus. However, [Plaintiff]
 8 would be able to complete tasks over a normal 8-hour workday with customary breaks.” AR 134,
 9 151. The ALJ found these opinions “somewhat persuasive,” finding both to indicate that Plaintiff
 10 had “limitations in concentration and persistence that did not significantly limit competitive
 11 employment.” AR 33.

12 Plaintiff contends the ALJ “fail[ed] to account for [Drs. Donahue and Eather’s] moderate
 13 limitation on [her] ability to maintain pace.” Dkt. 9, p. 8. Yet the ALJ did not fail to account for
 14 this limitation but, rather, found Drs. Donahue and Eather “essentially opined . . . limitations in
 15 concentration and persistence that did not significantly limit competitive employment.” AR 33.
 16 This finding is supported by Drs. Donahue and Eather’s opinions. AR 109, 146. Indeed, Plaintiff
 17 does not identify conflicts any conflicts between these doctors’ opinions and the ALJ’s residual
 18 functional capacity assessment. *See* Dkt. 9, p. 8. Because the ALJ properly determined that this
 19 “moderate” limitation in pace did not translate into a significant functional limitation, Plaintiff
 20 has not identified a conflict for the Court to resolve.

21 “Where the evidence is susceptible to more than one rational interpretation, one of which
 22 supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” *See Thomas v. Barnhart*, 278
 23 F.3d 947, 954 (9th Cir. 2002) (citing *Morgan*, 169 F.3d at 599). Although the evidence herein
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1 may be susceptible to more than one rational interpretation, this Court will not disturb the ALJ's
2 conclusion, which was supported by substantial evidence.

3 CONCLUSION

4 Based on the foregoing reasons, the Court hereby finds the ALJ properly concluded
5 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is affirmed and
6 this case is dismissed with prejudice.

7 Dated this 31st day of January, 2022.

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10 David W. Christel
United States Magistrate Judge

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